

1 Alfred L. Sanderson, Jr. (SBN 186071)
2 ASanderson@seyfarth.com
3 Ferry E. Lopez (SBN 274080)
4 FLopez@seyfarth.com
5 SEYFARTH SHAW LLP
6 400 Capitol Mall, Suite 2350
7 Sacramento, CA 95814-4428
8 Phone: (916) 448-0159
9 Fax: (916) 558-4839

10 Carmine R. Zarlenga (*pro hac vice* application submitted)
11 czarlenga@mayerbrown.com
12 MAYER BROWN LLP
13 1999 K Street NW
14 Washington, DC 20006-1101
15 Phone: (202) 263-3000
16 Fax: (202) 263-3300

17 Attorneys for Plaintiff, Foster Poultry Farms

18
19
20
21
UNITED STATES BANKRUPTCY COURT
22
FOR THE EASTERN DISTRICT OF CALIFORNIA
23
SACRAMENTO DIVISION
24

25 In Re:

26 ZACKY FARMS, INC.,

Debtor.

Case No. 12-37961-TH

Chapter: 11

Adv. Pro. No.:

Adversary Proceeding Complaint

27 FOSTER POULTRY FARMS,

28 Plaintiff,

29 v.

30 ZACKY FARMS, INC.,

31 Defendant.

**COMPLAINT OF FOSTER POULTRY
FARMS AGAINST ZACKY FARMS,
LLC FOR BREACH OF CONTRACT
AND UNFAIR COMPETITION**

1 Pursuant to 28 U.S.C. §§ 157(a), (b)(1), (c)(1) & 1334, and Rule 7001 *et seq.* of the
 2 Federal Rules of Bankruptcy Procedure, COMES NOW Plaintiff Foster Poultry Farms (“Foster
 3 Farms”) and for its causes of action against Debtor Zacky Farms, LLC (“Zacky Farms”) alleges
 4 and states as follows:

5 **NATURE OF THE CASE**

6 1. This action arises from Zacky Farms’ breach of two written agreements between
 7 the parties which govern the use of the “Zacky Farms” trademark.

8 2. In 2001, Foster Farms acquired the chicken-related assets of Zacky Farms in a
 9 complex, multi-million dollar transaction. As a key component of the deal, Zacky Farms agreed
 10 not to use the Zacky Farms trademark in conjunction with sales of chicken after the October 5,
 11 2001 closing. For the following eleven years, Zacky Farms honored the Purchase Agreement.
 12 Recently, however, Zacky Farms has breached the Purchase Agreement by offering chicken
 13 products for sale under the Zacky Farms trademark.

14 3. On October 26, 2012, Foster Farms through its counsel sent Zacky Farms a letter
 15 advising of the breach and demanding that Zacky Farms immediately cease use of the “Zacky
 16 Farms” name in conjunction with sales of chicken. Zacky Farms did not respond to the letter.

17 4. The actions of Zacky Farms not only breach the clear terms of the Purchase
 18 Agreement, but also constitute unfair competition, all resulting in irreparable injury to Foster
 19 Farms. Foster Farms brings this action to seek prompt redress for and injunctive relief against
 20 the ongoing wrongful actions of Zacky Farms.

21 **JURISDICTION AND VENUE**

22 5. On October 8, 2012, Zacky Farms voluntarily filed a bankruptcy petition under
 23 chapter 11 of title 11 of the United States Code, in the United States Bankruptcy Court for the
 24 Eastern District of California.

25 6. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28
 26 U.S.C. §§ 157(a), (b)(1) and (c)(1), in that this action arises in or is related to a case under title

1 11 of the United States Code. This action is a non-core proceeding, and this Court has
2 jurisdiction pursuant to 28 U.S.C. § 157(c)(1).

3 7. Venue lies properly in this judicial district pursuant to 28 U.S.C. § 1409(a).

4 **THE PARTIES**

5 8. Foster Farms is a California corporation whose principal place of business is
6 located at 1000 Davis Street, Livingston, CA 95334. Foster Farms is a family-owned poultry
7 manufacturing company that supplies fresh chicken, frozen chicken, turkey, fully cooked chicken
8 and turkey, and other related products to retail customers located in California and elsewhere.
9 Foster Poultry Farms is the successor in interest to all rights of Foster Farms, Inc.

10 9. Zacky Farms is a California corporation whose principal place of business is
11 located at 2020 S. East Street, Fresno, CA, 93721. Since selling its chicken business to Foster
12 Farms in 2001, Zacky Farms produces turkey products, including deli meats, whole turkeys, and
13 turkey frankfurters.

14 **FACTUAL BACKGROUND**

15 A. **The Purchase Agreement**

16 10. On March 22, 2001, Zorro Leasing LLC, Fresno Farming LLC, and Foster Farms,
17 Inc. (collectively “Purchasers”) and Zacky Farms, Zacky Foods, and A.B. AG Services, Inc.
18 (collectively, “Sellers”) signed a Purchase Agreement whereby the Purchasers acquired the entire
19 Zacky Farms chicken business from the Sellers. This business consisted of the growing,
20 processing, distributing, and selling of chicken and chicken products. A true and correct copy of
21 the Purchase Agreement and Schedules 1.1(b) and 2.2(i) to the Purchase Agreement, which refer
22 to the relevant intellectual property, are attached hereto as Exhibit 1 and incorporated herein by
23 reference.

24 11. Section 5.13 of the Purchase Agreement mandated that following the closing,
25 Zacky Farms and its affiliates would not use, nor allow a third party to use, certain intellectual
26 property listed in Schedule 2.2(i), including the “Zacky Farms” name.

1 12. The Purchase Agreement did grant Purchasers, including Foster Farms, the
2 limited and exclusive use of the “Zacky Farms” name for a duration of 36 months following the
3 closing. *Id.* at § 5.13 and Schedule 1.1(b). However, given that the closing took place on
4 October 5, 2001, this temporary license expired on October 5, 2004.

5 13. After that date, under the Purchase Agreement neither Foster Farms nor Zacky
6 Farms could use the “Zacky Farms” name in conjunction with their respective chicken
7 businesses. Ex. 1 at § 5.13 and Schedule 2.2(i).

8 **B. The Trademark License Agreement**

9 14. Following the closing of the transaction on October 5, 2001, Zacky Farms, Zacky
10 Foods, and A.B. AG Services, Inc. (collectively, “Licensors”) and Zorro Leasing LLC, Fresno
11 Farming LLC, and Foster Poultry Farms (collectively “Licensees”) entered into a Trademark
12 License Agreement which was aimed at facilitating the parties’ respective use of the various
13 trademarks impacted by the Purchase Agreement. A true and correct copy of the Trademark
14 License Agreement is attached hereto as Exhibit 2 and incorporated herein by reference.

15 15. Similar to the Purchase Agreement, the Trademark License provided that
16 following the expiration of the temporary license period, neither Zacky Farms, as a Lessor, nor
17 Foster Farms, as a Licensee, would have any further right to the Zacky Farms name for purposes
18 of the production, sale or distribution of chicken products. Ex. 2 at §10.

19 16. The Purchase Agreement, related Schedules 1.1(b) and 2.2(i), and Trademark
20 License Agreement contain highly confidential information. As a result, Foster Farms is filing a
21 request to seal these documents.

22 **C. Zacky Farms’ Violation of the Purchase and Trademark License Agreements**

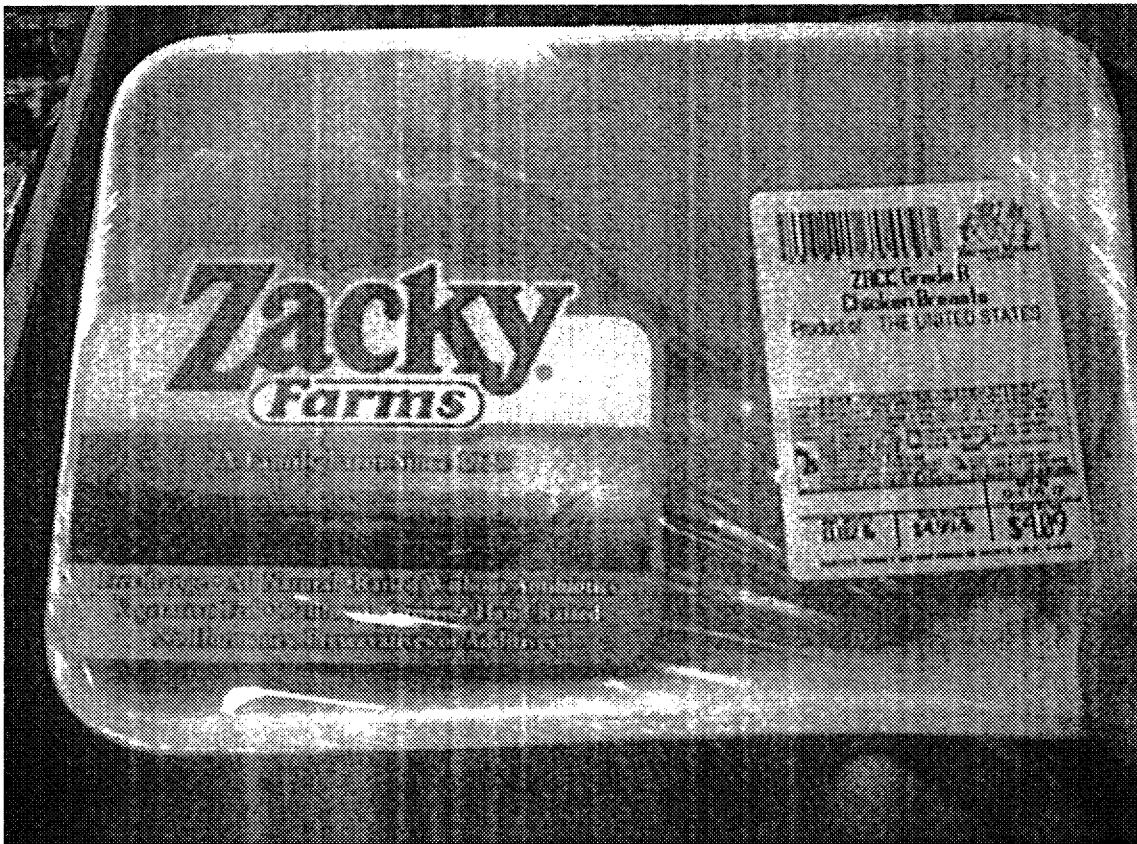
23 17. Despite the clear terms of the Purchase and Trademark License Agreements,
24 Zacky Farms recently has been involved in the sale of chicken products using the “Zacky Farms”
25 name.

26

1 18. A true and accurate photograph of the cold case at a Vincente Foods store in West
2 Los Angeles, California on October 12, 2012 shows Zacky Farms' unauthorized use of the
3 "Zacky Farms" name on chicken products:



1 19. There is no question that the "Zacky Farms" trademark is affixed to chicken
2 products as demonstrated in the following true and accurate close up photograph of packaged
3 chicken identified at a Harvest Market store in Novato, California on October 4, 2012:



19 20. At the time that it sold its chicken business to Foster Farms in 2001, the "Zacky
20 Farms" name was a recognized brand with a loyal customer base in the California chicken
21 market. By deceptively using the "Zacky Farms" name, even though it forfeited the right to do
22 so when it sold its chicken business, Zacky Farms is seeking a head-start in rebuilding its
23 chicken business.

24 21. As a result, Zacky Farms' continued use of the "Zacky Farms" name places Foster
25 Farms at a competitive disadvantage in that it no longer benefits from the goodwill and brand
26 recognition that it bargained for when it acquired the Zacky Farms chicken business. It is

impossible to quantify the damage that the actions of Zacky Farms have caused and continue to cause Foster Farms.

3 22. Foster Farms provided Zacky Farms with notice of the breach in an October 26,
4 2012 cease and desist letter. A true and correct copy of the October 26, 2012 letter is attached
5 hereto as Exhibit 3 and incorporated herein by reference. In the letter, Foster Farms immediately
6 demanded that Zacky Farms cease use of the "Zacky Farms" trademarks on chicken products.
7 Zacky Farms did not respond to the letter, leaving Foster Farms with no choice but to protect its
8 rights through this adversary proceeding.

**FIRST CAUSE OF ACTION
BREACH OF PURCHASE AGREEMENT**

23. Foster Farms incorporates as if fully set forth herein the allegations of Paragraphs 1-22 above.

3 24. Foster Farms performed all conditions, covenants and promises required on its
part to be performed in accordance with the terms and conditions of the Purchase Agreement.

3 26. By its actions, Zacky Farms has also breached and continues to breach the implied
covenant of good faith and fair dealing that is part of every contract under California law.

27. As a result of Zacky Farms' breach of the Purchase Agreement, Foster Farms has sustained irreparable harm for which there is no adequate remedy at law.

**SECOND CAUSE OF ACTION
BREACH OF TRADEMARK LICENSE AGREEMENT**

3 28. Foster Farms incorporates as if fully set forth herein the allegations of Paragraphs
4 1-27 above.

29. Foster Farms performed all conditions, covenants and promises required on its part to be performed in accordance with the terms and conditions of the Trademark License Agreement.

30. By its actions, Zacky Farms has committed a material breach of the Trademark License Agreement by selling chicken products affixed with the "Zacky Farms" trademark. As a result of the ongoing conduct of Zacky Farms, the breaches are recurring and continuous.

31. By its actions, Zacky Farms has also breached and continues to breach the implied covenant of good faith and fair dealing that is part of every contract under California law.

32. As a result of Zacky Farms' breach of the Trademark License Agreement, Foster Farms has sustained irreparable harm for which there is no adequate remedy at law.

THIRD CAUSE OF ACTION UNFAIR COMPETITION

33. Foster Farms incorporates in full the allegations of Paragraphs 1-32 above.

34. After selling its chicken business to Foster Farms in 2001, Zacky Farms forfeited the right to the “Zacky Farms” name for purposes of selling chicken products. Zacky Farms’ acts of selling products affixed with the “Zacky Farms” trademark as prohibited by the Purchase and Trademark License Agreements are unlawful, unfair or fraudulent business acts or practices and, therefore, constitute unfair competition within the meaning of the Business and Professions Code §§ 17200, *et seq.*

35. Foster Farms has suffered injury in fact and has lost money or property as a result of Zacky Farms' unfair competition.

PRAYER

WHEREFORE, Foster Farms prays as follows:

1. That judgment be entered in favor of Foster Farms and against Zacky Farms for breach of the Purchase and Trademark License Agreements.

2. That the Court issue a preliminary and permanent injunction preventing Zacky Farms from selling chicken products under the "Zacky Farms" name.

3. That judgment be entered in favor of Foster Farms and against Zacky Farms for unfair competition.

4. That Zacky Farms be required to disgorge any revenues derived from its wrongful actions to the fullest extent permitted by law.

5. Foster Farms' costs of suit herein, and other expenses and costs of litigation, including attorney's fees.

6. Such other and further relief as the Court deems just, equitable and proper.

DATED: November 20, 2012

SEYFARTH SHAW LLP

By: Alfred L. Sanderson, Jr.
Ferry E. Lopez

Attorneys for Plaintiff
FOSTER POULTRY FARMS

EXHIBIT 1

is filed with Foster Poultry Farms' Request to Seal Documents

EXHIBIT 2

is filed with Foster Poultry Farms' Request to Seal Documents

EXHIBIT 3

MAYER • BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

October 26, 2012

Carmine R. Zarlenga
Direct Tel +1 202 263 3227
Direct Fax 202 263 5227
czarlenga@mayerbrown.com

VIA FACSIMILE & FIRST-CLASS MAIL

Zacky Farms
Attn: Robert Zacky and Richard Zacky
2000 North Tyler Avenue
South El Monte, California 91733
Facsimile No.: (626) 401-4281

Skadden, Arps, Slate, Meagher & Flom LLP
Attn: Jeffrey H. Cohen, Esq.
300 South Grand Avenue
Los Angeles, California 90071-3144
Facsimile No.: (213) 687-5600

Re: Zacky Farms/Foster Farms

Dear Messrs. Zacky and Cohen:

This firm represents Foster Poultry Farms ("Foster Farms") in conjunction with Zacky Farms' breaches of certain agreements between Foster Farms and Zacky Farms. Specifically, it has come to the attention of Foster Farms that Zacky Farms has been selling chicken products using the "Zacky Farms" name. This is a violation of at least Section 5.13 of the March 22, 2001 Purchase Agreement between Foster Farms and Zacky Farms, which states in relevant part: "From and after the Closing, Sellers and Sellers' Affiliates will not, nor allow any third party to, use the Excluded Intellectual Property¹ in the production, sale, or distribution of any chicken product other than Ancillary Chicken Products." This activity is also a breach of Section 10 of the October 5, 2001, Trademark License Agreement between Zacky Farms and Foster Farms (among others), which states in relevant part: "Upon expiration of the License Period and the Sam's Club License Period, or upon the termination of the Trademark License, neither Licensees, Licensors nor any successor in interest shall have any further right to the Licensed

¹ "Excluded Intellectual Property" is defined in the Purchase Agreement to include the "Zacky Farms" name, among others. See March 22, 2001, Purchase Agreement, Section 1.1.

Mayer Brown LLP

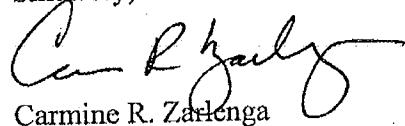
Zacky Farms
Skadden, Arps, Slate, Meagher & Flom LLP
October 26, 2012
Page 2

Intellectual Property² in connection with the production, sale or distribution of chicken products other than the use by Licensors and any successor in interest with respect to the Ancillary Chicken Products and any non-chicken products.” Zacky Farms’ actions also constitute violations of the California Unfair Competition Law (California Business and Professions Code Sections 17200 *et seq.*).

Zacky Farms’ activities are in blatant disregard of Foster Farms’ rights, and will not be tolerated. Accordingly, Foster Farms demands that Zacky Farms immediately cease use of the “Zacky Farms” name in connection with the production, sale, and distribution of chicken products in violation of the Purchase Agreement and Trademark License Agreement, and confirm in writing to Foster Farms Zacky Farms’ cessation of same. In the event Zacky Farms does not confirm by November 5, 2012, Foster Farms will pursue all available remedies to the full extent permitted by law.

Foster Farms reserves all of its rights and waives none. Please feel free to contact us if you have any questions or would like to discuss further.

Sincerely,



Carmine R. Zarlenga

cc: Randall C. Boyce

² “Licensed Intellectual Property” is defined to include the “Zacky Farms” name, among others. See March 22, 2001, Purchase Agreement, Section 1.1 and Schedule 1.1(b).